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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT ANDREW REPKA,

Defendant and Appellant.

B238994

(Los Angeles County Super. Ct.  
Nos. MA051301, MA052362, &  
MA053321)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles A. Chung, Judge. Affirmed and remanded with directions.

Sarah A. Stockwell, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, and Erika D. Jackson, Deputy Attorney General, for Plaintiff and Respondent.

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Defendant and appellant Robert Repka was serving formal probation in two cases (MA0051301 and MA052362) when he was convicted in a third case (MA053321) and sentenced to three concurrent terms in state prison. This appeal involves the imposition of various fines, fees, and assessments, and defendant's right to custody and conduct credits in the three cases.

We remand the matter for amendment of the abstracts of judgment and minute orders dated January 10, 2012, and otherwise affirm the judgment.

## **PROCEDURAL HISTORY**

### **Domestic Violence Conviction, Case No. MA051301**

On January 5, 2011, defendant pled no contest to two charges—inflicting corporal injury to a spouse in violation of Penal Code section 273.5, subdivision (a),<sup>1</sup> with a prior conviction for the same offense, and vandalism to a police car with damage in excess of \$400 in violation of section 594, subdivision (a). On January 26, 2011, defendant was granted probation on terms and conditions including service of 84 days in county jail, with credit of 42 days actual custody and 42 days of conduct credit. Defendant was also ordered to pay various fines and fees, including a domestic violence fund fee of \$400 pursuant to section 1203.097.

Probation was twice revoked, based upon defendant's convictions in the two subsequent cases. A minute order reflects that probation had been summarily revoked and defendant was in custody on the first probation violation as of April 4, 2011. On June 14, 2011, probation was formally revoked and reinstated, with a modification that defendant serve an additional 153 days in county jail, with credit of 77 days served and 76 days of good time/work time credit.

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<sup>1</sup> All subsequent statutory references are to the Penal Code, unless otherwise indicated.

Defendant appeared in court, in custody on the second probation violation on July 5, 2011. Probation had been revoked to preserve jurisdiction. On January 10, 2012, defendant admitted he was in violation of probation. Probation was revoked and terminated, and defendant was committed to state prison for four years. The oral judgment of the court awarded defendant three days of credit. However, the minute order from the sentencing hearing and the abstract of judgment state defendant had total credits of 294 days in custody, consisting of 198 days served and 96 days good time/work time.

### **Residential Burglary Conviction, Case No. MA052362**

On June 14, 2011, defendant pled no contest to first degree residential burglary (§ 459). He was placed on formal probation, conditioned on service of 115 days in county jail, with credit of 77 days actual custody and 38 days of conduct credit, and payment of fines and fees. According to the minute order dated July 5, 2011, defendant was in custody after probation was summarily revoked to preserve jurisdiction following defendant's arrest in the third case. On January 10, 2012, defendant admitted he violated probation. Probation was revoked and terminated. Defendant was sentenced to state prison for four years. In the oral pronouncement of judgment, defendant was awarded three days credit and "past credits" of 115 days. However, the abstract of judgment and the minute order of the sentencing hearing indicate defendant was awarded total credit of 406 days, consisting of 310 days served and 96 days of good time/work time.

### **Possession of a Controlled Substance Conviction, Case No. MA053321**

On January 10, 2012, defendant pled no contest to possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)) and admitted suffering a prior serious or violent felony conviction within the meaning of the three strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). Probation was denied, and defendant was sentenced to state prison for 32 months. The oral pronouncement of judgment, minute

order, and abstract of judgment all reflect that defendant was awarded total credits of 291 days, consisting of 195 days in custody and 96 days of good time/work time.

## **DISCUSSION<sup>2</sup>**

### **I. Unauthorized Fines, Fees, and Assessments**

Defendant argues, and the Attorney General concedes, that unauthorized fines, fees, and assessments were imposed and mandatory fines, fees, and assessments were omitted at sentencing. We have jurisdiction to order amendment of the January 10, 2012 minute orders and abstracts of judgment to reflect the applicable fines, fees and assessments. (See *People v. Smith* (2001) 24 Cal.4th 849, 851-854 [trial court's failure to impose mandatory fine may be corrected on appeal]; *People v. Dotson* (1997) 16 Cal.4th 547, 554, fn. 6 (*Dotson*) [appellate court may correct an unauthorized sentence on review].)

#### **A. Case No. MA051301**

The trial court properly imposed a \$400 domestic violence fund fee when it granted defendant probation on his conviction for corporal injury to a spouse (§ 273.5, subd. (a)) on January 26, 2011. (See § 1203.097, subds. (a), (d) [requiring trial court to impose a domestic violence fee whenever a defendant is granted probation for a crime in which the victim is a spouse].) However, that section applies only to cases in which probation is granted, and when the trial court terminated probation and sentenced defendant to state prison, the fee was no long applicable and should not have been reordered. (See *People v. Lewis* (1992) 7 Cal.App.4th 1949, 1955-1956 [the terms and

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<sup>2</sup> Because the facts of the cases are not necessary to resolve the issues on appeal, we do not recount them here.

conditions of his probation cease to exist when probation is revoked and a state prison sentence is imposed.].) Accordingly, the trial court's re-imposition of the domestic violence fee at sentencing must be stricken from the January 10, 2012 minute order and abstract of judgment.

**B. Case No. MA052362**

In pronouncing judgment committing defendant to state prison, the trial court failed to orally impose the \$30 criminal conviction assessment (Gov. Code, § 70373), \$40 court security fee (§ 1465.8), \$10 crime prevention fee (§ 1202.5), and mandatory penalties and surcharge in conjunction with the \$10 crime prevention fee. The minute order and abstract of judgment imposed other unauthorized fees.

The January 10, 2012 minute order and abstract of judgment correctly reflect the \$30 criminal conviction assessment (Gov. Code §70373), \$40 court security fee (§1465.8), and \$10 crime prevention fee (§ 1202.5), which should stand. The minute order and abstract of judgment must be amended to reflect the following mandatory penalties and surcharge in conjunction with the \$10 crime prevention fee: a \$10 penalty assessment (§ 1464, subd. (a)(1)), a \$7 penalty assessment (Gov. Code, § 76000, subd. (a)(1)), a \$2 penalty assessment (Gov. Code, § 76000.5, subd. (a)(1)), a \$2 state surcharge (§ 1465.7, subd. (a)), a \$3 state court construction penalty (Gov. Code, § 70372, subd. (a)(1)), a \$1 DNA penalty (Gov. Code, § 76104.6, subd. (a)(1)); and a \$3 DNA state-only penalty (Gov. Code, § 76104.7, subd. (a)). (*People v. Knightbent* (2010) 186 Cal.App.4th 1105, 1109; *People v. Castellanos* (2009) 175 Cal.App.4th 1524, 1528-1530.) Any other fines, fees, penalties or surcharges reflected in the minute order and abstract of judgment are unauthorized and must be stricken.

**C. Case No. MA053321**

The trial court orally imposed a \$10 theft prevention fee and “\$120 in fees” at sentencing. This was error.

Defendant was convicted of possession of a controlled substance pursuant to Health and Safety Code section 11377, subdivision (a), to which the \$10 theft prevention fee does not apply. (See § 1202.5, subd. (a) [“In any case in which a defendant is convicted of any of the offenses enumerated in section 211, 215, 459, 470, 484, 487, 488, or 594, the court shall order the defendant to pay a fine of ten dollars (\$10) . . . .”].) The \$10 theft prevention fee was therefore unauthorized and must be stricken from the abstract of judgment.<sup>3</sup>

The “\$120 in fees” imposed at the hearing appears to refer to the \$30 criminal conviction assessment (Gov. Code, § 70373), \$40 court security fee (§ 1465.8), and \$50 lab fee (Health & Saf. Code, § 11372.5, subd. (a)), which were properly imposed. The minute order and abstract of judgment properly reflect the fees and assessment, which should stand. The \$50 lab fee is subject to the following penalties and surcharge, which were not imposed: a \$50 state penalty (§ 1464, subd. (a)(1)); a \$35 county penalty (Gov. Code, § 76000, subd. (a)(1)); a \$10 state surcharge (§ 1465.7, subd. (a)); a \$15 state court construction penalty (Gov. Code, § 70372, subd. (a)(1)); a \$10 emergency medical services penalty (Gov. Code, § 76000.5, subd. (a)(1)); a \$5 deoxyribonucleic acid penalty (Gov. Code, § 76104.6, subd. (a)(1)); and a \$15 state-only deoxyribonucleic acid penalty (Gov. Code, § 76104.7, subd. (a)), which total \$140. (See *People v. Sharret* (2011) 191 Cal.App.4th 859, 863-864; §§ 1202.4, subd. (e), 1465.8, subd. (b); Gov. Code, § 70373, subd. (b).) The minute order and abstract of judgment must be corrected to include these mandatory fees and surcharges, and to reflect fees and surcharges totaling \$190 (\$140 penalty assessment plus \$50 lab fee). Any other fines, fees, penalties or surcharges

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<sup>3</sup> It does not appear in the January 10, 2012 minute order.

reflected in the minute order and abstract of judgment are unauthorized and must be stricken.

## **II. Custody and Conduct Credits**

Defendant argues he is entitled to custody credits equal to the total time he spent in custody, including the time during which his probation was revoked, because the sentences in all three cases are to be served concurrently. The Attorney General disagrees but alternately argues the case should be remanded for the trial court to calculate the credits defendant earned, because the court failed to give a basis for its calculations. We agree defendant's custody credits were calculated incorrectly, but conclude we have authority to recalculate the credits.

Generally, it is the duty of the trial court to determine the periods of the defendant's custody and the number of days to be credited. (§ 2900.5, subd. (d).) When the facts are undisputed, however, a defendant's entitlement to custody credits presents a question of law for the appellate court's independent review, as the trial court has no discretion in awarding custody credits. (*People v. Shabazz* (1985) 175 Cal.App.3d 468, 473-474.) Here, the periods of time during which defendant was in custody, and the grounds for his custody, are contained in the record. Calculation of defendant's custody credits is therefore a question of law, which we review *de novo*. (*Ibid.*)

To obtain actual custody credit for presentence confinement, a defendant must prove the conduct for which he was sentenced was a "but-for" or dispositive cause of that confinement. (*People v. Bruner* (1995) 9 Cal.4th 1178, 1180.) When the trial court imposes concurrent sentences for unrelated crimes at the same time, presentence custody attributable to each of the charges must be credited against all of the sentences. (*People v. Kunath* (2012) 203 Cal.App.4th 906, 910-911.)

With respect to conduct credit, defendant argues that he is entitled to one-for-one credits in all three cases. The Attorney General concedes defendant is entitled to one-for-

one conduct credits in case No. MA051301, but disputes that he is so entitled in case Nos. MA052362 and MA053321.

**A. Case No. MA051301**

Defendant's credits against his four-year state prison sentence are properly calculated as follows: (1) on the initial grant of probation, 42 days of custody credit and 42 days of good time/work time credit;<sup>4</sup> (2) after the first revocation of probation and reinstatement of probation, 77 days of custody credit (from the date of arrest, March 30, 2011 to June 14, 2011) and 77 days of good time/work time credit; and (3) after the second revocation of probation and commitment to state prison, 195 days of custody credit (June 30, 2011 through January 10, 2012) and 195 days of good time/work time credit.

Defendant's custody credit on his first case should have been 314 days served (42 plus 77 and 195) and 314 days of good time/work time credit. Total credits earned are 628 days. We order the trial court to prepare an amended abstract of judgment and minute order reflecting these credits in MA051301.

**B. Case No. MA052362**

Defendant's credits are properly calculated as follows: (1) on the initial grant of probation, 77 days of custody credit (from the date of arrest, March 30, 2011 to June 14, 2011) and 38 days of good time/work time credits; and (2) after revocation of probation and commitment to state prison for four years, 195 days of custody credit (June 30, 2011 through January 10, 2012) and 96 days of good time/work time credit.

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<sup>4</sup> Under the version of section 2933, subdivision (e), in effect at the time of defendant's first offense, he was entitled to one day of good time/work time credit for each day of presentence custody.



Defendant's custody credit on his second case should have been 272 days served (77 plus 195) and 134 days of good time/work time credit (96 plus 38). We order the trial court to prepare an amended abstract of judgment and minute order reflecting these credits in case No. MA052362. Total credits earned are 406 days.

Defendant's claim of entitlement, as a matter of equal protection of law, to one-for-one awards of conduct credits for each day of custody credits under amendments to sections 2933 and 4019 not applicable at the time of this offense, has been consistently rejected. (*People v. Brown* (2012) 54 Cal.4th 314, 330 (*Brown*); *People v. Ellis* (2012) 207 Cal.App.4th 1546, 1552 (*Ellis*).)

We also reject defendant's argument that, even if he is not entitled to one-for-one conduct credits for the full time he spent in custody, he is entitled to earn one-for-one credits for his time served on and after the October 1, 2011 effective date of the latest amendments to section 4019 pursuant to *Brown, supra*, 54 Cal.4th at page 322. *Brown* analyzed an earlier revision of section 4019 (effective Jan. 25, 2010) and held that prisoners in presentence custody overlapping the statute's operative date must earn conduct credit at two different rates. (*Ibid.*) Specifically, conduct credits earned on the basis of actual custody prior to the effective date are to be calculated under the previous statute, and conduct credits earned on the basis of actual custody on and after the effective date are to be calculated under the statute in effect at that time.

*Brown* is distinguishable from this case, in that former section 4019 did not specifically state whether the statute was effective retrospectively or prospectively. Current section 4019, subdivision (h) provides: "The changes to this section enacted by the act that added this subdivision shall apply prospectively and shall apply to prisoners who are confined to a county jail, city jail, industrial farm, or road camp *for a crime committed on or after October 1, 2011.*" (Emphasis added.) By its plain language, section 4019 does not apply to defendant because he committed his crime prior to October 1, 2011, and the Legislature did not intend for the statute to be applied retroactively. The application of well settled principles of statutory construction leads to the logical conclusion that defendant is therefore not entitled to conduct credit at the

enhanced rate for time served on or after October 1, 2011, because he committed his crime before the effective date. (See *Brown, supra*, 54 Cal.4th at p. 319 [“[It is a] time-honored principle . . . that in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature . . . must have intended a retroactive application.’ [Citations.]”].)

***C. Case No. MA053321***

Defendant was sentenced to three years eight months in state prison in the third case. He was awarded 291 days of presentence credit, including 195 days of actual custody and 96 days of local conduct credit. This calculation is correct. Defendant is not entitled to one-for-one conduct credits for each day served on this sentence. (*Brown, supra*, 54 Cal.4th at p. 330; *Ellis, supra*, 207 Cal.App.4th at p. 1552.)

**DISPOSITION**

We remand the matter for the trial court to amend the abstracts of judgment and minute orders dated January 12, 2010, as follows:

***Case No. MA051301***

The \$400 domestic violence fund fee must be stricken, and the January 10, 2012 minute order and abstract of judgment must reflect a total of 314 days of actual custody, 314 days of conduct credit, and a total of 628 days credited against defendant’s state prison sentence.

***Case No. MA052362***

The January 10, 2012 minute order and abstract of judgment must be amended to reflect all of the relevant mandatory fees, including:

1. the \$40 court security fee (§ 1465.8);
2. the \$30 criminal conviction assessment (Gov. Code, § 70373);
3. the \$10 crime prevention fee (§ 1202.5);
4. the \$10 penalty assessment (§ 1464, subd. (a)(1));
5. the \$7 penalty assessment (Gov. Code, § 76000, subd. (a)(1));
6. the \$2 penalty assessment (Gov. Code, § 76000.5, subd. (a)(1));
7. the \$2 state surcharge (§ 1465.7, subd. (a));
8. the \$3 state court construction penalty (Gov. Code, § 70372, subd. (a)(1));
9. the \$1 DNA penalty (Gov. Code, § 76104.6, subd. (a)(1)); and
10. the \$3 DNA state-only penalty (Gov. Code, § 76104.7, subd. (a)).

All other fees, fines, penalties and/or surcharges imposed are unauthorized and must be deleted. The minute order and abstract of judgment must also be amended to reflect a total of 272 days of actual custody, and 134 days of conduct credit, for a total of 406 days credited against defendant's state prison sentence.

***Case No. MA053321***

The January 10, 2012 minute order and abstract of judgment must be amended to reflect all of the relevant mandatory fees, including:

1. the \$40 court security fee (§ 1465.8);
2. the \$30 criminal conviction assessment (Gov. Code, § 70373);
3. the \$50 lab fee (Health & Saf. Code, § 11372.5, subd. (a));
4. the \$50 state penalty (§ 1464, subd. (a)(1));
5. the \$35 county penalty (Gov. Code, § 76000, subd. (a)(1));
6. the \$10 state surcharge (§ 1465.7, subd. (a));

7. the \$15 state court construction penalty (Gov. Code, § 70372, subd. (a)(1));
8. the \$10 emergency medical services penalty (Gov. Code, § 76000.5, subd. (a)(1));
9. the \$5 deoxyribonucleic acid penalty (Gov. Code, § 76104.6, subd. (a)(1)); and
10. the \$15 state-only deoxyribonucleic acid penalty (Gov. Code, § 76104.7, subd. (a)).

All other fees, fines, penalties and/or surcharges imposed are unauthorized and must be deleted. The total fees and surcharges must be corrected to show total fees and surcharges of \$190.

In all other respects, the judgment is affirmed.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J.

MOSK, J.